No. 19-7487

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN BLADES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF FOR PETITIONER

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INTRODUCTION

There is no dispute that there is a conflict on a constitutional question of fundamental importance: whether a trial is "public" if the public cannot hear it. As petitioner and amici argue, the purposes of the public-trial right, such as discouraging perjury, cannot be served unless the public can hear the trial. The holding of the court below and others that the entirety of individual voir dire of prospective jurors may be shielded from public hearing therefore undermines the fundamental fairness of trials. The government takes a different view, but one that makes resolving the conflict no less important. According to the government, voir dire must be conducted outside of public hearing to ensure that jurors make full and frank disclosures. Although the government does not come out and say it, it follows from the government's position that this Court's intervention is necessary because many courts, bound by precedent or custom, continue to voir dire prospective jurors in open court, needlessly frustrating the selection of impartial juries. When all parties agree that there is a conflict on an issue of constitutional law, and that one or the other side of that conflict is causing ongoing harm to the fundamental fairness of countless trials, the need for this Court's review is paramount. This Court should grant the petition.

I. The conceded conflict should be resolved by this Court.

The government concedes that the lower courts are divided on whether a "public trial" requires that the public be allowed to hear the trial. BIO 17-18 (citing *In re Memphis Publ'g Co.*, 887 F.2d 646 (6th Cir. 1989)). But the government urges denial of the petition because the "conflict between *Memphis Publishing* and the decision below" is "shallow." BIO 18. This contention is both immaterial and incorrect.

Although this Court may refrain from resolving a shallow conflict where the issue is unimportant, needs more time to percolate in the lower courts, or is likely to resolve itself, the government does not contend that any of these circumstances apply. Given that, this Court should not allow an acknowledged, entrenched conflict on an important and recurring constitutional question to fester. In any event, the split is deeper than the government admits. But regardless of the exact size of the split, the answer to the question presented will impact hundreds if not thousands of trials each year across the nation. This Court's review is urgently needed.

1.a. The purported shallowness of a conflict on an important question is no reason to deny review. This Court frequently grants review to resolve 2-1 or 1-1 splits,[1] even over similar government objections of shallowness.[2] Because "the public-trial right is important for fundamental reasons," *Weaver v. Massachusetts*, 137 S. Ct.

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[1] *See* Stephen M. Shapiro et al., Supreme Court Practice 242 (10th ed. 2013); *see also, e.g.*, *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081, 1087 (2020) (2-1 split); *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 876-77 (2019) (2-1 split); *Dahda v. United States*, 138 S. Ct. 1491, 1496 (2018) (2-1 split); *Nichols v. United States*, 136 S. Ct. 1113, 1117 (2016) (1-1 split).

[2] *See, e.g.*, BIO, *Byrd v. United States*, 2017 WL 3053629, at *4 (urging denial of review of "relatively shallow" 2-1 split), *opinion at* 138 S. Ct. 1518 (2018); BIO, *Koons v. United States*, 2017 WL 6313955, at *19 (arguing that review is not warranted because "only one court of appeals . . . has taken a position inconsistent with the decision below"), *opinion at* 138 S. Ct. 1783 (2018); BIO, *Bravo-Fernandez v. United States*, 2016 WL 537491, at *19 (arguing that a "single outlying decision by a state court does not warrant this Court's intervention"), *opinion at* 137 S. Ct. 352 (2016); BIO, *Ocasio v. United States*, 2014 WL 7387210, at *7 (urging denial of review of 1-1 split because "[t]he disagreement is shallow and of comparatively recent origin, and its boundaries are not fully defined"), *opinion at* 136 S. Ct. 1423 (2016); BIO, *Elonis v. United States*, 2014 WL 1603331, at *13 ("[R]eview . . . is not warranted because the circuit split is shallow and may resolve itself without this Court's intervention."), *opinion at* 575 U.S. 723 (2015).

1899, 1910 (2017), a conflict on a material question about the scope of the public-trial right warrants review regardless of the conflict's size. This Court should now allow a "public trial" to mean fundamentally different things in different courtrooms.

b. Although the shallowness of a split may indicate a more fundamental reason to deny review, the government identifies no such reason here. The government does not dispute that the issue in this case is important and recurring. Nor could it. As explained in the petition and the supporting amicus briefs of the Reporters Committee for Freedom of the Press (RCFP), the Cato Institute, and law professors who have studied the public-trial right, the public's ability to hear trial proceedings, including voir dire, is essential to fulfilling the constitutional purposes of a public trial. And resolution of the question presented will determine whether these important purposes are fulfilled in a huge number of cases each year in the District of Columbia, Massachusetts, and elsewhere.

The government's counterview of the merits only underscores the importance of the question presented. The government argues that conducting voir dire of all prospective jurors privately at the bench is a "best practice" and critical to ensuring juror candor. BIO 13-15 (citation omitted). But the government concedes that, in at least some jurisdictions, trial courts are bound by precedent to question prospective jurors in open court. Even where there is no local precedent squarely on point, the common practice of conducting voir dire in open court reflects a widespread understanding that this Court's public-trial precedents require it. *See, e.g.*, Jury Instructions Comm. of the Ninth Cir., A Manual on Jury Trial Procedures 54 (2013

ed.) ("*When there are legitimate privacy concerns*, judges should inform the potential jurors of the general nature of sensitive questions to be asked and *allow individual jurors to make affirmative requests to proceed at sidebar or in chambers*." (emphases added)); Fed. Judicial Ctr., Benchbook for U.S. Dist. Ct. Judges § 2.06, at 89 (6th ed. 2013) ("[F]ollow-up questions will be addressed to the juror(s) (*at sidebar, if such questions concern private or potentially embarrassing matters*) . . . ." (emphasis added)); James J. Gobert et al., Jury Selection: The Law, Art & Science of Selecting a Jury § 10:6 (2018-19 ed.). According to the government, all these courts are needlessly inhibiting the selection of impartial juries. Thus, while the government is wrong on the merits, *see* Section II, its position dictates that resolving the question presented is critical.

There is no other reason to leave the conflict in place. The government does not contend that the issue needs to further percolate. And the government does not claim that the conflict will resolve itself absent this Court's review. Nor could it make such a claim, given that the court below considered and rejected *Memphis Publishing*, and it denied rehearing en banc. App. 15a n.6, 63a. There is also nothing to suggest that the Sixth Circuit would reconsider *Memphis Publishing*, which has stood for over thirty years and accords with the longstanding and still-widespread practice of questioning prospective jurors in open court. Thus, the split is firmly entrenched and this Court's intervention is necessary to resolve it.

c. The government, though acknowledging the conflict between the decision below and *Memphis Publishing*, also tries to downplay it. According to the

government, "[t]he Sixth Circuit did not consider whether the husher procedure was, in fact, an 'alternative[] to closure,' rather than a closure itself." BIO 18 (quoting *Presley v. Georgia*, 558 U.S. 209, 214 (2010)) (second alteration in original). But in holding that the husher procedure was a closure, the Sixth Circuit rejected the notion that it was an "alternative to closure" regardless of whether it used that particular phrase. *See Memphis Publ'g*, 887 F.2d at 648 (husher procedure "effectively closed [voir dire] to the public," and trial judge's concern about jurors' exposure to press coverage "was insufficient to justify closure"). In fact, the dissent argued that the husher procedure was the best among the "alternatives" to physical closure, *id.* at 651 (Norris, J., dissenting), but the majority disagreed. The Sixth Circuit's holding that the husher procedure was a "closure," and the ruling below that the identical procedure "does not amount to a 'closure,'" App. 17a n.7, are in direct conflict.

The government also contends that the Sixth Circuit did not "address concerns like those articulated by the trial court here concerning juror candor." BIO 18. But the court below did not address such concerns either. The majority opinion's sole reference to "the candor of prospective jurors" was a direct quotation of the trial judge in describing his ruling. App. 12a. It did not otherwise "address" those concerns or whether they justified a closure. The court instead held that use of a husher was not "a closure subject to the requirements of *Waller*[*v. Georgia*, 467 U.S. 39 (1984)]," and thus it required no justification or findings at all. App. 17a. In contrast, because the Sixth Circuit held that this procedure is a closure, it went on to address whether the closure was constitutionally justified by the trial court's case-specific concerns (about

prejudicial pretrial publicity) and held it was not. *Memphis Publ'g*, 887 F.2d at 648. That the Sixth Circuit held that the husher procedure was an unjustified closure, while the court below held that this same procedure was not a closure that needed to be justified at all, makes the conflict all the more stark.

2.a. Although the government does not dispute that there is a 3-1 split, the split is actually deeper. Both the D.C. Circuit and the California Supreme Court have, like the Sixth Circuit, held that, absent an overriding interest that warrants questioning certain jurors in private, voir dire must be within the public's hearing.

i. The government contends that *Cable News Network, Inc. v. United States*, 824 F.2d 1046 (D.C. Cir. 1987) (per curiam), turned on the fact that voir dire was conducted "outside the courtroom, in a private jury room from which the public was excluded entirely." BIO 17. But if the D.C. Circuit's opinion turned on that fact, then the opinion would have mentioned it. It did not. The government instead pulls that fact from a subsequent petition for a writ of certiorari. *See id.* (citing Pet., *Deaver v. Cable News Network, Inc.*, No. 87-331, 1987 WL 954872, at *9-14 (U.S. Aug. 26, 1987)). But, as the cited petition shows, the voir dire process challenged in *Cable News Network* included not only questioning jurors in a private room, but also then returning to the public courtroom for additional questioning privately "at the bench." Pet., 1987 WL 954872, at * 6. And, though the government notes that there was initially no objection to these procedures in the district court, once the press did object (and took a mid-voir dire interlocutory appeal), it argued—and the D.C. Circuit agreed—that voir dire must generally occur "in *open court*," *Cable News Network*, 824

F.2d at 1047 (emphasis added), a term consistently used for the specific purpose of distinguishing courtroom proceedings that are audible to the public from those at a private bench conference. *See, e.g.*, *Pounders v. Watson*, 521 U.S. 982, 983 (1997) (per curiam) (distinguishing between statements "said at *a bench conference only* or reiterated in *open court*" (emphases added)); *United States v. Washington*, 705 F.2d 489, 496 (D.C. Cir. 1983) (noting that "part of voir dire was first put to the panel of prospective jurors *in open court*," while "further inquiry of the thirteen jurors who [discussed their prior involvement in the criminal justice system] was taken *at the bench*" (emphases added)); App. 10a ("[T]he court posed *voir dire* questions to prospective jurors *in open court* and, thereafter, questioned individual jurors about their responses *at the bench* . . . ." (emphases added)). The government itself consistently uses "open court" this way. *See* BIO 4, 6, 15, 19. *Cable News Network*'s requirement of voir dire in "open court" directly conflicts with the decision below.

ii. The government acknowledges that the California Supreme Court in *People v. Virgil*, 253 P.3d 553 (Cal. 2011), held that "the questioning of prospective jurors should be conducted in open court," but the government points to the court's statement that it found "no case that holds sidebar conferences to discuss *sensitive or potentially prejudicial matters* are akin to a closure of the courtroom, violating state or federal constitutional public trial guarantees." *Id.* at 578 (emphasis added). This statement simply reflects that *Virgil* cited and applied this Court's holdings that "[t]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting

disclosure of sensitive information." *Id.* at 577-78 (quoting *Presley*, 558 U.S. at 213 (quoting *Waller*, 467 U.S. at 45)) (internal quotation marks omitted). *Virgil* held that "brief bench conferences," in which some jurors discussed sensitive matters like sexual abuse, while the remaining jurors were questioned in open court, "imposed no more than a de minimus infringement of the public trial guarantee." *Id.* at 578. *Virgil* thus directly conflicts with the decision below, which upheld a blanket rule that all prospective jurors may be questioned at the bench.

b. On the other side of this conflict, the government acknowledges that there are at least two courts—the court below and the Massachusetts Supreme Judicial Court. *See* BIO 15 (citing *Commonwealth v. Colon*, 121 N.E.3d 1157, 1170 (Mass. 2019)). The government does not dispute that the Ohio Supreme Court is also on this side of the split. *See* Pet. 10-11 (discussing *State ex rel. Law Office of Montgomery Cty. Pub. Def. v. Rosencrans*, 856 N.E.2d 250 (Ohio 2006) (per curiam)). The majority there adopted the same rationale that trial proceedings are "public" if they take place in a physically open place, even if the public is barred from hearing. *See Rosencrans*, 856 N.E.2d at 255; *see also id.* at 258-59 (Pfeifer, J., dissenting).

* * *

In sum, there is no dispute that the lower courts are divided on an important question of constitutional law that impacts an extraordinary number of cases. The conflict is firmly entrenched and should be resolved by this Court.

II. The decision below is wrong.

A trial cannot be "public" for constitutional purposes if the public cannot hear it. The government does not meaningfully respond to petitioner's and amici's

arguments that the purposes of a public trial cannot be served if the trial is inaudible. The government offers no explanation for how the public can deter perjury, check judicial or prosecutorial misconduct, or ensure itself of the fairness of the jury, *see Waller*, 467 U.S. at 46; *Press-Enterprise Co. v. Super. Court of Cal., Riverside Cty.*, 464 U.S. 501, 509 (1984), if the public cannot hear anything said during voir dire.

1.a. The government reiterates the rationale of the court below that the husher procedure "still allow[ed] the public to observe the proceedings and obtain transcripts of any obscured dialogue." BIO 14. But the public's ability to "observe" voir dire is worthless if the public cannot hear. It is the speaking, not the visual display, that matters. The government also does not dispute that transcripts of jury selection typically cost hundreds or thousands of dollars, and are unavailable for days or weeks. As amici emphasize, purchasing transcripts is often cost prohibitive even for major news organizations, let alone the average public observer; the delay in obtaining transcripts, and transcripts' inability to fully capture voir dire, often render them obsolete. RCFP Br. 9-12 & n.2; Law Profs. Br. 8-9. Unless the public can hear voir dire, its occurrence in an open courtroom is an empty formality.

The government itself points out that there is *"'no functional difference'* between conducting individual voir dire in a jury deliberation room and holding a sidebar conference." BIO 15 (quoting *Wilder v. United States*, 806 F.3d 653, 660 (1st Cir. 2015)) (emphasis added). Indeed, the very purpose of voir dire at the bench with the husher is to afford jurors the same "privacy" that they would have in a private room. App. 10a n.4 (citation omitted). But while the government does not dispute that

holding voir dire in a jury room from which the public is excluded would violate the public-trial right, *see* BIO 13, it contends that the functionally equivalent procedure of holding voir dire at a private sidebar is perfectly valid. This cannot be right.

b. The government claims that the husher procedure is justified because jurors are less "forthcoming" when questioned in open court. BIO 13 (quoting 1/7/15 Tr. 253). The government, in effect, asserts that the quality of jury selection is better when it is done in private. But the Constitution enshrines the opposite view—that the quality of jury selection is better when done in public. *See Press-Enterprise*, 464 U.S. at 508-10. Courts cannot disregard an express constitutional command based on a policy disagreement.

The cases the government cites do not suggest otherwise. Two of these cases upheld closure of voir dire in highly unusual cases based on case-specific findings about extensive pretrial publicity. *See United States v. King*, 140 F.3d 76, 82-83 (2d Cir. 1998) (in trial of famous boxing promotor Don King, district court's "explicit findings" about prejudicial press coverage made this the "*unusual* case where the fairness of a trial, or at least the *voir dire* phase, *that is usually promoted by public access* is seriously at risk of being impaired" (emphases added)); *In re S.C. Press Ass'n*, 946 F.2d 1037, 1041 (4th Cir. 1991) (closure justified in "highly charged" prosecutions of state legislators for selling their votes). The other two cited cases did not address the public-trial right at all. *See Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959) (holding that jurors should have been questioned individually about exposure to negative press coverage "out of the presence *of the remaining jurors*"—

not outside the public's presence (emphasis added)); *Collins v. State*, 158 A.3d 553, 563 (Md. 2017) (encouraging the "questioning [of prospective jurors] at the bench or in a conference room" without mentioning the public-trial right). These cases do not support the ruling below that courts may employ private voir dire in every case, over a public-trial objection, based on a trial judge's general views about juror candor. *See, e.g.*, *King*, 140 F.3d at 82 ("We do not mean to suggest that public access to jury *voir dire* questioning may be routinely or even occasionally limited by the mere possibility that public questioning might inhibit the candor of the *voir dire* responses.").

c. The government does not even try to reconcile its position with *Press-Enterprise*. In *Press-Enterprise*, this Court directed a procedure for those limited situations were prospective jurors may be questioned privately: a juror must "make an affirmative request" for private questioning, and the trial judge must then "ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy." 464 U.S. at 512; *see also Cable News Network*, 824 F.2d at 1049. As the petition explained, *Press-Enterprise* is fundamentally incompatible with the husher procedure, which gives every juror privacy without any "affirmative request" or individualized findings. Pet. 15-16. The government offers no response.

2. The government also contends that a ruling that voir dire must be conducted in open court would render unconstitutional the longstanding practice of conducting mid-trial sidebars. This is incorrect.

a. Traditional sidebars to discuss evidentiary rulings or administrative matters are constitutional not because they occur in front of an audience who cannot

hear, but because they "are distinct from trial proceedings" to which the right of public access attaches. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (affirming "the traditional authority of trial judges to conduct *in camera* conferences"). Private conferences to discuss legal or administrative matters do not violate the public trial right whether they occur in a private sidebar conference in the courtroom or a judge's private chambers. *See, e.g.*, *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993) (reading this Court's public-trial cases as authorizing "the exclusion of the public and the press from conferences at the bench and in chambers where such conferences are distinct from trial proceedings"); *United States v. Norris*, 780 F.2d 1207, 1210 (5th Cir. 1986) ("Non-public exchanges between counsel and the court on such technical legal issues and routine administrative problems do not hinder the objectives which the Court in *Waller* observed were fostered by public trials."). It is not their location, but their content that makes traditional sidebars compatible with the public-trial right.

On the other hand, "'shifting portions of the proceedings to a bench conference or an in camera proceeding to escape the open-trial right *goes beyond the historically accepted uses of these proceedings and is unconstitutional*.'" *NBC Subsid. (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 363 (Cal. 1999) (emphasis added) (citation omitted); *see also State v. Whitlock*, 396 P.3d 310, 316 (Wash. 2017); *Morris Publ'g Grp., LLC v. State*, 136 So. 3d 770, 783 (Fla. Dist. Ct. App. 2014). "[M]erely characterizing something as a 'sidebar' does not make it so," and "[t]o avoid

implicating the public trial right, sidebars must be limited in content to their traditional subject areas." *State v. Smith*, 334 P.3d 1049, 1054 n.10 (Wash. 2014).

b. It is the government's suggestion—that whatever happens at a sidebar is consistent with the public-trial right—that is troubling. If this were correct, then any portion of the trial—including witness testimony or closing arguments—could evade public scrutiny, without any special justification, simply by being shifted to a sidebar. Indeed, the court in *Rosencrans* held that, as long as a trial is in a public chamber, the entirety of the trial may routinely be kept inaudible to the public. *See Rosencrans*, 856 N.E.2d at 254-55. *But see People v. Ramey*, 606 N.E.2d 39, 41-42 (Ill. App. Ct. 1992) (deactivating sound system to prevent audience from hearing closing arguments violated the Sixth Amendment public-trial right). The government does not defend *Rosencrans*. But it offers no limiting principle that would allow voir dire, but not the other parts of a trial, to be conducted at a private bench conference. General concerns about witness candor could justify private testimony as easily as concerns about juror candor. This Court should grant review to hold that the public-trial right is not so easily evaded.

III. There is no vehicle issue.

This case is an ideal vehicle to resolve the question presented. The government does not dispute that the issue was squarely preserved and decided at every level. The only vehicle issue asserted is that, "[e]ven if petitioner were correct that the courtroom was effectively closed during voir dire, that closure was justified based on the trial court's findings." BIO 18. Because the government contends that the closure of voir dire could be affirmed on that alternative basis, it contends that the question

presented is "not outcome-determinative." *Id.* at 20. Contrary to the government's contention, this claimed alternative ground for affirmance is not a vehicle problem.

Because the court below held that the husher procedure was not "a closure subject to the requirements of *Waller*," it did not go on to address whether the trial court made specific findings as required by *Waller*. App. 17a. The government does not contend otherwise. Thus, even if this were an issue, it would not be an issue for this Court. Rather, this Court would follow its usual practice: resolve the question presented and, if petitioner prevails, "remand for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *see also, e.g.*, *United States v. Stitt*, 139 S. Ct. 399, 407-08 (2018); *Rosemond v. United States*, 572 U.S. 65, 83 (2014).

In any event, the government's argument that the trial court's concerns about juror candor justified the closure under *Waller* would fail. In *Press-Enterprise*, this Court rejected this same purported justification that the trial court offered here—that "juror responses would lack the candor necessary to assure a fair trial," 464 U.S. at 503—and held it was insufficient, *id.* at 513. The court below has also held that "a generalized concern about juror candor is not enough to overcome the presumption of open access." *In re Jury Questionnaires*, 37 A.3d 879, 888 (D.C. 2012). As Judge Beckwith noted in her dissent, the majority did "not dispute that such a generalized justification would fail the *Waller* test." App. 41a. The findings necessary to justify a closure must go beyond generalized policy concerns applicable in every case, and should be based on particular concerns in an individual case. *See Globe Newspaper*,

457 U.S. at 608 (safeguarding child sex victims could justify closure only "on a case-by-case basis"); *see also Presley*, 558 U.S. at 215 ("If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course."); *Cable News Network*, 824 F.2d at 1049 (closure requires "*individualized* findings that *specific* jurors had compelling reasons for wishing to keep private responses to *particular* questions" (emphases added)). Here, the trial court did not cite anything about these particular jurors or this particular case that warranted closure. Any concerns about privacy or candor should have been addressed on a juror-by-juror basis as directed by *Press-Enterprise*, not a blanket policy of private voir dire.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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